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In the Supreme Court of the United States

OCTOBER TERM, 1994

JAMIL SALEH D/B/A KB'S LIMITED FINE FOODS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly disqualified from the food stamp program on the grounds that his clerk had unlawfully trafficked in food stamps and petitioner failed to show that he had instituted an effective policy to prevent such trafficking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-40a) is unpublished, but the decision is noted at 41 F.3d 1504 (Table). The opinion of the district court (Pet. App. 41a- 56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1994. A petition for rehearing was denied on January 5, 1995. Pet. App. 57a-58a. The petition for a writ of certiorari was filed on April 3,

1995. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Food Stamp Act, 7 U.S.C. 2011 *et seq.*, establishes a program under which low-income households receive coupons that may be used for the purchase of food from approved retail food stores. 7 U.S.C. 2013(a), 2016(b) (Supp. V 1993). To participate in the program, a food store must obtain approval from the United States Department of Agriculture, Food and Nutrition Service (USDA). 7 U.S.C. 2018(a) (1988 & Supp. V 1993); 7 C.F.R. Pt. 278. To obtain approval, a store owner must certify that he understands the USDA's regulations and that he accepts responsibility for violations committed by his employees. See C.A. App. 58-62.

Under the food stamp program, a store may not accept coupons in exchange for cash. 7 C.F.R. 278.2(a) and (d). The unlawful buying or selling of coupons for cash is known as "trafficking." 7 C.F.R. 271.2. Under the Act, a store that has engaged in trafficking is subject to permanent disqualification from the program, even for a first offense. 7 U.S.C. 2021(b)(3)(B) (1988 & Supp. V 1993). The Secretary of Agriculture has discretion to impose a civil penalty instead of permanent disqualification if "the Secretary determines that there is substantial evidence [including evidence that neither the ownership nor management of the store or food concern was aware of, approved, benefitted from or was involved in the conduct or approval of the violation] that such store or food concern had an effective policy and program in effect to prevent violations of the Act and the regulations." *Ibid.*

The USDA has adopted regulations to implement the statutory disqualification and penalty provisions. Those regulations specify that a firm is subject to permanent disqualification if "[p]ersonnel of the firm have trafficked." 7 C.F.R. 278.6(e)(1)(i). The regulations further provide that a store must satisfy the following four minimum criteria in order to be eligible for imposition of a civil penalty rather than permanent disqualification:

> *Criterion 1.* The firm shall have developed an effective compliance policy as specified in § 278.6(i)(1); and
>
> *Criterion 2.* The firm shall establish that both its compliance policy and program were in operation at the location where the violation(s) occurred *prior* to the occurrence of violations cited in the charge letter sent to the firm; and
>
> *Criterion 3.* The firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2); and
>
> *Criterion 4.* Neither firm ownership nor management were aware of, approved, benefitted from, or were in any way involved in the conduct or approval of trafficking violations.

7 C.F.R. 278.6(i). To satisfy Criterion 3, a firm must "document its training activity by submitting to [the USDA] its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up

training held prior to the violation(s)." 7 C.F.R. 278.6(i)(2).

When a food store is charged with trafficking, it is entitled to notice and an opportunity to submit information in support of its position to the USDA. 7 U.S.C. 2023(a) (1988 & Supp. V 1993). The store also has a right to *de novo* review of the USDA's final decision in federal district court. *Ibid.*

2. Petitioner operates a small grocery store in Wilmington, North Carolina. In August 1991, a USDA undercover agent entered petitioner's store and offered the part-time clerk $100 worth of food stamps in exchange for cash. The clerk offered to pay the agent $60 and the transaction was completed. A week later the undercover agent again went to petitioner's store and sold the part-time clerk $200 worth of food stamps for $100. The clerk subsequently pleaded guilty to unlawful possession of food stamps, in violation of 7 U.S.C. 2024 (1988 & Supp. V 1993). Pet. App. 25a-27a.

In July 1992, the USDA notified petitioner that his store was responsible for the clerk's trafficking violations and that the USDA was considering permanently disqualifying petitioner and his store from further participation in the food stamp program. Petitioner objected to permanent disqualification and requested that he be sanctioned with a civil penalty instead. In support of that request, petitioner submitted an affidavit in which he stated that he did not know about his clerk's trafficking violations, that he made sure that his clerk knew about the laws and regulations regarding the food stamp program, and that he tried to monitor the clerk to make sure that he complied with the laws and regulations. The clerk also submitted an affidavit stating that he used his

own money to purchase the food stamps and that petitioner was unaware of his unlawful activities. Pet. App. 27a-29a.

The USDA permanently disqualified petitioner from participation in the food stamp program. It denied petitioner's request for a civil penalty in lieu of permanent disqualification on the ground that petitioner had failed to show that his store had an effective policy in effect to prevent violations of the food stamp program. Pet. App. 29a.

3. a. Petitioner then sought judicial review in the United States District Court for the Eastern District of North Carolina. The court granted summary judgment in the government's favor, agreeing with the USDA that petitioner failed to establish that his store had an effective policy to prevent violations of the food stamp program. Pet. App. 30a, 41a-56a.

b. The court of appeals affirmed. Pet. App. 23a-40a. The court held that the Section 2021 of the Food Stamp Act requires the Secretary to disqualify permanently a food store that has engaged in trafficking unless "(1) the owner neither knew of nor benefitted from the trafficking and (2) the store had 'an effective policy and program' to prevent violations of the Act." Pet. App. 31a. The court found that petitioner had established that he neither knew of nor benefitted from the clerk's trafficking. *Id.* at 36a-38a. It found, however, that petitioner had failed to establish that the store had an effective policy and program to prevent violations. The court explained:

> [Petitioner] did not submit any dated training curricula. His conclusory affidavit did not provide any dates of training sessions for [his clerk], no[r] did his affidavit even provide the dates of [his

> clerk's] employment. Finally [petitioner] did not provide any contemporaneous documentation of [the clerk's] participation in training.

Id. at 38a-39a. The court accordingly held that petitioner "d[id] not qualify for any sanction short of permanent disqualification." *Id.* at 39a.

ARGUMENT

1. Petitioner contends that he satisfied the criteria set forth in 7 C.F.R. 278.6(i) for establishing that his store had implemented an effective program to prevent violations of the Food Stamp Act. For that reason, petitioner contends, he should have been subjected to a civil penalty rather than permanent disqualification for the trafficking violations committed by his clerk. Pet. 7-16. That fact-bound contention is without merit.

Section 278.6(i) establishes four minimum criteria that a store must satisfy in order to establish that it had an effective policy to prevent violations of the food stamp program. The third criterion is that "the firm had developed and instituted an effective personnel training program as specified in § 278.6(i)(2)." Section 278.6(i)(2), in turn, requires a store to "document its training activity by submitting to [the USDA] its dated training curricula and records of dates training sessions were conducted; a record of dates of employment of firm personnel; and contemporaneous documentation of the participation of the violating employee(s) in initial and any follow-up training held prior to the violation(s)."

Petitioner failed to provide any of the information required by Section 278.6(i)(2). As the court of appeals explained (Pet. App. 38a-39a), petitioner submitted nothing more than a conclusory affidavit in

which he claimed that he had provided effective training. He did not submit dated training curricula, the dates of training sessions, the dates of his clerk's employment, or contemporaneous documentation of his clerk's participation in training. *Ibid.* Because petitioner failed to provide the information required by the regulations, he was not eligible to be considered for a civil penalty in lieu of disqualification. *Id.* at 39a.

Petitioner argues (Pet. 12-13) that it is impractical for small store owners to have formal training documents or to retain written records of when training has occurred. He therefore contends that the regulations should be interpreted to permit small store owners to establish compliance without providing such information. The requirements in Section 278.6(i), however, unambiguously apply to all store owners; there is no exception for small stores. Moreover, interpreting the regulation in accordance with its terms does not work any unusual hardship. As the court of appeals noted, the USDA will provide written training materials to all store owners. App. 39a n.4; see 7 C.F.R. 278.6(i)(2)(iii). Finally, the requirements in Section 278.6(i) serve important purposes that fully justify the burdens they impose. Training that is formalized is far more likely to be effective than training that is not, and documented evidence of training is a much more reliable indication that training has occurred than is an after-the-fact affidavit.

Petitioner contends (Pet. 14-15) that the decision below conflicts with *Freedman* v. *USDA*, 926 F.2d 252 (3d Cir. 1991). There is, however, no such conflict. In *Freedman*, the USDA imposed a civil penalty on a store for trafficking violations committed by its

employees, even though the owner was unaware of the violations and had implemented an effective policy to prevent such violations. *Id.* at 254. No issue was raised in the court of appeals in *Freedman* concerning the USDA's finding that an effective policy to prevent violations had been implemented. The sole question was whether a store "can be subject to a civil money penalty for the independent trafficking violations of its clerk when the owner establishes that she had no knowledge of the trafficking and did not participate in or benefit from it, and further establishes to the satisfaction of the [USDA] that prior to the violations she had implemented an effective program to prevent violations." *Id.* at 253. The court held that a civil penalty could be imposed. *Ibid.* Because *Freedman* did not address the threshold question of what information a store must provide to establish that it had implemented an effective program to prevent violations, that decision is inapposite here.*

2. Petitioner also contends (Pet. 16-20) that 7 U.S.C. 2021 (1988 & Supp. V 1993) does not authorize the permanent disqualification of an owner who was not involved in his employee's violation. That contention is also without merit. As the court of appeals concluded (Pet. App. 31a), to avoid disqualification under Section 2021 (1988 & Supp. V

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* The court noted in passing that the USDA had found that the store had implemented an effective policy on the basis of affidavits submitted by the store owner and two of her employees. 926 F.2d at 254. The court did not discuss, however, what information was included in those affidavits. There is therefore no basis for petitioner's suggestion (Pet. 14 n.1) that the USDA has administered its regulations in an inconsistent manner.

1993), a store owner must establish not only that he was unaware of his employee's violations, but also that his store had implemented an effective program to prevent violations.

That conclusion is clear from the text and history of Section 2021. In 1982, Congress amended the Food Stamp Act to provide for permanent disqualification for a first trafficking offense. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 175, 96 Stat. 781. The courts of appeals then divided on the question whether Congress intended to disqualify an owner who had no knowledge of an employee's trafficking. *Ghattas* v. *United States*, 40 F.3d 281, 283 (8th Cir. 1994) (citing cases). In 1988, Congress amended the Act to allow for the imposition of a civil penalty, in lieu of disqualification, when the Secretary finds that the store "had an effective policy and program in effect to prevent violations of the chapter and the regulations." 7 U.S.C. 2021(b)(3)(B) (1988 & Supp. V 1993).

The import of the 1988 amendment is unmistakable. As the Eleventh Circuit recently explained, "the fact that the statute was amended to provide for a more lenient penalty for certain innocent owners leads to the conclusion that innocent store owners who fail to meet the requirements for the imposition of a [civil penalty] may be permanently disqualified." *TRM, Inc.* v. *United States*, No. 94-6684 (May 19, 1995), slip op. 2057. The courts of appeals that have addressed the question have uniformly reached the same conclusion. *Ghattas*, 40 F.3d at 283 n.3; *Goldstein* v. *United States*, 9 F.3d 521, 523-524 (6th Cir. 1993); *Freedman*, 926 F.2d at 258-260, 261 n.13. Thus, whatever the meaning of Section 2021 prior to the 1988 amendment, it is now clear that an innocent

owner must be disqualified for the trafficking violations of his employees unless he can establish that the store had implemented an effective policy to prevent violations. Because petitioner failed to make that showing, the USDA properly disqualified him from the food stamp program.

In arguing that an innocent owner is not subject to permanent disqualification under Section 2021, petitioner relies entirely on cases decided prior to the 1988 amendment. Pet. 17-18 & n.3. Because those cases do not discuss the impact of the 1988 amendment, they have no relevance here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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